No. 06-

IN THE

Supreme Court of the United States

J.H. FLETCHER & CO.,

Petitioner,

v.

JERRILL DAVIS AND VIRGINIA DAVIS, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a federal regulatory scheme such as the Mine Safety and Health Act ("MSHA"), 30 U.S.C. §§ 801, *et seq.*, that on its face preempts only conflicting state laws, may so occupy a limited field within that scheme that it reflects an intent to preempt any state law purporting to regulate in that discrete area.

Whether a federal regulatory scheme such as the MSHA, that permits states to impose health and safety standards more stringent than the federal requirements, contemplates the creation of the more stringent standards through tort litigation rather than by positive legislative enactments.

PARTIES TO THE PROCEEDINGS

The petitioner here, appellant below, is J.H. Fletcher & Co. [hereinafter "Fletcher"], a manufacturer of roof bolting machines that drill into rock to create the architectural support that prevents mine collapse.

The respondents, appellees below, are West Virginia coal miners and their spouses.

CORPORATE DISCLOSURE STATEMENT

J.H. Fletcher & Co. has no parent company, and no publicly held company owns ten percent (10%) or more of its stock.

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OPINION BELOW

The opinion of the West Virginia Supreme Court of Appeals is reported at __ S.E.2d __, 2006 WL 3543017 (W. Va. 2006), and is reprinted in the Appendix ("Pet. App.") at 1a. That Court reversed the Circuit Court of Mingo County whose opinion is reprinted at Pet. App. 27a.

JURISDICTIONAL STATEMENT

The West Virginia Supreme Court of Appeals, the highest state court in West Virginia, issued its opinion on December 4, 2006.

This Court has jurisdiction under 28 U.S.C. § 1257(a). The opinion below upsets the intent of Congress to preempt state law as to dry dust suppression systems incorporated within roof bolting machines and impairs the Mine Safety and Health Administration's regulations that require manufacturers to submit to the agency all engineering drawings, all use warnings and instructions, and an end product for performance testing and approval. 30 U.S.C. §§ 801-811, 844, 955 (2000); 30 C.F.R. Part 33 (2006).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution governs the issues presented. The specific federal statutes and regulations involved are provisions of the Mine Safety and Health Act 30 U.S.C. §§ 801-811, 844, 955, and certain of its implementing regulations, 30 C.F.R. Part 33.

STATEMENT OF THE CASE

A. The Parties

Petitioner Fletcher designs and manufactures underground mining equipment and has devoted most of its engineering expertise to one product, the underground roof bolting machine. A roof bolting machine is a large apparatus used to install metal rods ("roof bolts") and glue ("resin") into the roof and walls of a mine. The roof bolts and resin bond with the earth's layers, creating an architectural network that prevents the roof and walls from collapsing.

All of the Fletcher machines at issue are equipped with dry dust suppression systems. Before any version of the dry dust suppression system designed by Fletcher can be incorporated into a roof bolting machine and placed in the stream of commerce, it must be inspected, tested and approved by the federal Mine Safety and Health Administration ("MSHA") (formerly the Bureau of Mines) to ensure its engineering, workmanship, performance, and test results with respect to air quality and dust emissions.

Respondents are coal miners who have worked in underground coal mines and have received state employment benefits for dust-related occupational illness and their spouses.

B. Federal Standards Related to Roof Bolting Machines

Congress established the Bureau of Mines in 1910, and gave to it primary responsibility for promoting miner safety. H.R. 13915, 61st Cong., 36 Stat. 369 (1910). But the Bureau was expressly forbidden to inspect or supervise the mines in

any State. *Id.* A Federal inspection program was created when the Federal Coal Mine Safety Act was passed in 1941, but it too was ineffective because federal employees could not require coal mine inspections and thereby lacked serious enforcement authority. H.R. 2682, 77th Cong., 55 Stat 177 (1941).

Congress amended the Federal Coal Mine Safety Act in 1952, and finally empowered the Bureau of Mines to conduct inspections. *Amendments to the Fed. Coal Mine Safety Act: Hearings Before the Subcomm. On Labor of the Senate Comm. On Labor & Pub. Welfare*, 89th Cong. 63-64 (1965) [hereinafter *Hearings*] (Annual Report, Division of Coal Mine Inspection, Bureau of Mines, 1964). Title I of the 1952 Act addressed miner health and called upon federal inspectors to determine the causes of accidents and occupational diseases. Title II took the first step in regulating the machinery and products used in coal mines, mandating that any electrical equipment used at the mine face had to be approved before use. S. 1310, 77th Cong. § 209(f), 66 Stat. 692 (1952).

In 1960, the Federal Bureau of Mines (now the Mine Safety and Health Administration) promulgated 30 C.F.R. Part 33 to regulate roof bolting machines, implementing Congress' determination of a need for dramatic changes in roof control technology in light of the demonstrated success of roof bolting machines:

> [U]ntil 1948, no person or agency had produced any new or improved means of satisfactorily solving the problems presented by this No. 1 killer in coal mines. The Bureau realized that, to reduce coal mine injuries, it would be necessary to find better methods of roof control; its efforts in that

> direction finally culminated in a new method of roof control known as roof bolting, . . . The basic principle of this method is to prevent the initial sag in exposed roof strata by converting the strata into a rigid beam, with steel bolts set in holes drilled in the roof rock.

Hearings, *supra*, at 87 (Annual Report, Division of Coal Mine Inspection, Bureau of Mines, 1964). It is this set of regulations that lies at the heart of this case. "The regulations in this part set forth the requirements for dust collectors used in connection with rock drilling in coal mines to procure their certification as permissible for use in coal mines . . . ." 30 C.F.R. § 33.1 (2006). Part 33 includes an approval process that entails a written application describing any independent laboratory used in testing the equipment, a specification of the operating conditions for which certification is requested, drawings and specifications, details of all dust-collector parts, storage capacity, net filter area in the dust separator, and a complete unit or system for inspection and testing. 30 C.F.R. § 33.6 (2006).

If a roof bolting machine is approved by MSHA, any subsequent changes to that product must be submitted to a similar approval process. 30 C.F.R. § 33.12 (2006).

On January 10, 1969, Senator Jennings Randolph introduced what became the 1969 Federal Coal Mine Safety and Health Law, 30 U.S.C. §§ 801, *et seq.* In that legislation Congress declared that "the dust from drilling in rock shall be controlled by the use of permissible dust collectors, or by water or water with a wetting agent or by any other method or devices approved by the Secretary which is at least as effective in controlling such dust." 30 U.S.C. § 844 (2000).

The need for uniformity in this aspect of federal mine safety law was confirmed again in 1977 when Congress addressed another deficiency in federal authority: the limitation of prior law to coal mines. The 1977 amendments extended federal jurisdiction and the provisions of Chapter 30 to all mines (metal, non-metal and coal). In those amendments Congress also prescribed federal control over warning labels:

> Any mandatory health or safety standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that miners are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure.

30 U.S.C. § 811 (7) (2000).

Far from promoting uniformity, if the West Virginia Supreme Court of Appeals decision stands, a manufacturer of roof bolting machines in the United States may be subjected to repetitive and disparate outcomes in the courts of any of the fifty states despite the fact that all such manufacturers have relied upon the federal approval, testing and certification system set forth in regulations in 1960 and enacted by Congress in 1969. This Petition seeks relief from this perilous burden.

C. Proceedings Below

In these lawsuits, Respondents seek to recover for silicosis through common law claims asserted against current

and former coal mine operators (employers) and product liability claims against equipment manufacturers, including manufacturers of roof bolting equipment. Respondents contend that they did not know, despite federal laws explicitly dealing with quartz (silica) in mines (30 C.F.R §§ 70.100-70.101 (2006) and 30 C.F.R. §§ 90.100-90.101 (2006)), that quartz is liberated by the work they perform.

In response to Motions to Dismiss, the Circuit Court of Mingo County, West Virginia, ruled in favor of Petitioner, finding Respondents' common law claims preempted by federal law. Because the issues presented were both unsettled and very important, the Circuit Court certified the questions to the West Virginia Supreme Court of Appeals. In reversing the Circuit Court, the Supreme Court of Appeals failed to recognize the preemptive control that the United States Congress had vested in the Department of Labor and the MSHA over this discrete component of the mining industry.

REASONS FOR GRANTING THE PETITION

Enforcing proper principles of preemption is a critical undertaking in striking an appropriate balance between national and state interests in our federal system. No federal court has yet construed the preemption and savings clause provisions of the Mine Safety and Health Act (30 U.S.C. § 955 (2000)). Given the importance of both the industry and the health and safety of its workers, and the spate of recent tort litigation, the scope of the Act's preemption provisions is in urgent need of definition. The decision of the West Virginia Supreme Court of Appeals threatens to undermine the balance struck by Congress and the federal Mine Safety and Health Administration because its opinion disregards the federal government's preemption of the narrow

field in which roof bolting machines with dry dust suppression systems are regulated. In addition, the decision below misreads federal law to permit tort suits as a means of establishing supplemental state rules.

I. The West Virginia Supreme Court Erred in Finding No Field Preemption in the Area of Roof Bolting Machines

A. This Court Has Not Addressed the Question of Whether a Federal Regulatory Regime Allowing for Concurrent State Law May Also Establish Field Preemption and Proscribe State Law Within a Discrete Area of That Regime

This Court has recognized three types of preemption of state law by federal law. Express preemption is the most straightforward because the federal statute explicitly expresses an intent to preempt state policy within the federally regulated area. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990). This Court has also recognized implied preemption when a federal statute does not expressly preempt state law but certain factors are present that indicate a congressional intent to effect some form of preemption. There are two forms of implied preemption. Conflict preemption precludes state laws that are incompatible with federal law. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190, 203-04 (1983). Field preemption precludes state law when federal policy so completely occupies the regulatory territory that there is no room for additional state regulation. *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 152-53 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947). "Pre-emption may result not only from action taken by Congress itself; a

federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986).

Little attention has been paid, however, to whether only one type of preemption may be found within a given federal regulatory scheme, or whether Congress and the agencies to which it delegates authority may sometimes incorporate more than one form of preemption within the same scheme. That question is ripe for determination in this case, as that kind of limited preemption applies to roof bolting machine regulation within the broader arena of mine safety and health policy. Although in other provisions the MSHA allows for concurrent state regulation that is more stringent than federal law, it has nonetheless *completely* preempted the field of roof bolting machine regulation, thus precluding *any* state regulation regardless of whether or not it is more stringent. In other words, it has carved out an area of field preemption within a broader regime that otherwise allows for state involvement.

The West Virginia Supreme Court presumed that the inclusion of an express preemption provision within the Mine Safety and Health Act meant that field preemption principles could not apply. But this conclusion ignores the reality of the federal regulatory regime in question. Although Congress may have expressed a general desire to permit more stringent state laws in the area of mine safety and health, it also zeroed in on roof bolting machines with dry dust suppression systems and created a regulatory apparatus that leaves no room for supplementation by the states. As this Court has held, the "ultimate task in any preemption case is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole" looking to "the provisions of the whole law, and to its object and policy." *Gade v. Nat'l*

Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992). This the West Virginia Supreme Court of Appeals did not do. There is nothing inherently contradictory in finding implied field preemption for a narrow area within a broader regulatory regime that otherwise leaves room for state law. *See, e.g., Freightliner Corp. v. Myrick*, 514 U.S. 280, 288-89 (1995) (existence of express preemption provision does not foreclose implied preemption).

This Court should grant certiorari here to address the important question of whether more than one preemption principle may apply within the same regulatory regime.

B. The Federal Government Has Occupied the Field of Regulating Roof Bolting Machines

The historical review in the Statement of the Case of federal mine safety and health policy shows that roof bolting machines with dry dust suppression systems have been the subject of comprehensive and highly detailed federal regulation. This leads to the conclusion that, although Congress may have provided for complementary state regulation in some areas of mine safety and health (30 U.S.C. § 955(b) (2000)), in the discrete area of the manufacture and labeling of roof bolting machines, federal standards alone govern. 30 U.S.C. §§ 801, 811, 844 (2000); 30 C.F.R. Part 33 (2006).

Both Congress and the Mine Safety and Health Administration have left no doubt that they intend to fully occupy the field in regulating the design, manufacture and labeling of roof bolting machines. Accordingly, any additional state regulation in this area must be preempted. Through both statutory enactments and detailed regulations,

the federal government has codified requirements for roof bolting machines as to materials, design specifications, dimensions of component parts, product quality, engineering principles, dust performance, and warnings, labeling and maintenance instructions. 30 U.S.C. § 844 (2000); 30 C.F.R. Part 33 (2006). Most critically, manufacturers of roof bolting machines must obtain approval from the federal Mine Safety and Health Administration before the machines may be sold and put into use, and before any modifications may be made in models previously approved.

The United States has imposed an inspection, testing and approval system for the design, composition and use of only one underground coal mining device related to dust: the dry dust suppression system in roof bolting machines. There is no other set of regulations within Title 30 that imposes such complete control over all aspects of a product's manufacture and labeling. This provides the strongest possible evidence that federal law is intended to occupy entirely the field of regulation for these machines. Congressional intent to preempt

> may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

English, 496 U.S. at 79, (quoting *Rice*, 331 U.S. at 230).

It would be inconsistent with the structure of this regulatory scheme to conclude that a state – whether through an agency or a jury – may establish its own set of requirements for the machines, when ultimately the federal Mine Safety and Health Administration holds the key to approval.

In many cases this Court has held that when a federal statute evinces an intent to preempt state law in an area, as it has here, it preempts not only state statutes and regulations but state common law suits asserting claims in that area as well. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). Congress' clear intent to effect field preemption in the area of roof bolting machines means that Respondents' tort claims against Petitioner cannot be allowed to proceed, for any finding of tort liability as to an approved machine would by its very nature be in conflict with federal law.

II. States May Not Supplement Federal Regulations Pertaining to Roof Bolting Machines Via Tort Liability Under Principles of Conflict Preemption

Although federal regulation of roof bolting machines leaves no room for state regulation under field preemption principles, the express conflict preemption provision in the MSHA forecloses "regulation" via jury verdicts as well.

Like many federal statutes, the Mine Safety and Health Act contains a section addressing state law. That section says that any state law that conflicts with federal law in the area of mine safety and health is preempted. 30 U.S.C. § 955(a) (2000). It also provides that states may set forth laws and regulations that are more stringent than federal law, so long

as those laws and regulations do not conflict with federal law. 30 U.S.C. § 955(b) (2000).

The West Virginia Supreme Court held that it is permissible to promulgate more stringent mine safety and health rules via jury verdicts (in addition to state legislation or administrative regulation). That is error, however, because if a judge or jury finds a roof bolting machine manufacturer liable in tort when the machine has met with federal approval, that ruling would inherently conflict with federal law.

Petitioner respectfully urges this Court to hold that a state may not supplement existing federal law pertaining to roof bolting machines by means of common law developments. Even if a federal regulatory scheme allows for complementary state regulation,[1] it should do so through legislative means appropriate for promulgating new requirements that purport to bind regulated entities. Allowing ad hoc state regulation via jury verdicts will subject manufacturers to vast uncertainty and potentially punish those who have made strenuous efforts to comply with applicable federal requirements.

As this Court stated in *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000), the policy goal of uniformity that underlies preemption "favors preemption of state tort suits,

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[1] As set forth in section I. *supra*, Petitioner argues that this regulatory scheme does not allow for *any* supplemental state regulation under 30 CFR Part 33, which forecloses not only jury verdicts but any form of state law encroaching upon regulation of roof bolting machines. If this Court rejects Petitioner's field preemption argument, however, it must at least find that any supplemental state regulation must take the form of a positive legislative or administrative enactment.

for the rules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts." *Id.* at 871. Petitioner's roof bolting machines are sold and used in at least sixteen states as well as abroad; the patchwork of "regulation" to which it would be subject would be dizzying if not only the various states themselves but an untold number of juries could dictate idiosyncratic design changes in its products. This type of intrusion into an area of clear federal preemption thus would not only undermine the carefully constructed federal regulatory framework, but also have a substantial and adverse impact on commercial entities operating across multiple state lines.

The plain language of the MSHA provision authorizing more stringent state law contemplates state laws promulgated by the legislature or regulatory agencies. The statute says that "any State *law or regulation*" that provides for more stringent health and safety standards will not be construed to be in conflict with the federal statute (emphasis added). Unlike instances in which federal preemption is phrased in looser terms such as "requirements" or "standards" and such terms were construed to include common law developments,[2] Congress chose to use the words "law or regulation" in the MSHA, words which this Court has read in similar contexts to mean legislation or agency regulation, not common law.

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[2] *See, e.g., Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) ("safety standard" construed to include those enumerated through tort law claims); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993) ("law, rule, regulation, order, or standard" construed to encompass common law duties); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) ("requirement or prohibition . . . under state law" construed to encompass common law).

See, e.g., Sprietsma v. Mercury Marine, 537 U.S. 51, 63 (2002) ("'a [state or local] law or regulation' .. . is most naturally read as not encompassing common-law claims"). Congress did not use the looser terms found in other federal preemption statutes, and it contains no savings provision expressing a preference for the continued use of tort suits to complement federal regulation.[3]

The federal regulatory apparatus governing the production and use of roof bolting machines is so comprehensive that even the labels affixed to them must win approval before the machines may be sold and used. The regulations further proscribe any alterations to previously-approved machines unless such alterations are themselves approved. *See* 30 C.F.R. § 33.12 (2006) (proposed modifications not allowed without prior approval).

It therefore defies reason to suggest that Congress intended that a jury should be allowed to determine that, despite compliance with all of the applicable federal standards, a manufacturer is nonetheless somehow negligent for failing to adhere to a more general tort standard. If such a finding of liability were to cause the manufacturer to alter the design or labeling of its product, the manufacturer would still have to submit such proposed alterations to the MSHA for approval. If that federal agency were to disagree with the jury and disallow that jury's mandated changes, what could the manufacturer, caught between Scylla and Charybdis, do? This would be a classic case of conflict preemption in which "it is impossible to comply with both state and federal law." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984);

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[3] *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000).

Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963).

It is apparent that the regulatory mechanism envisioned by the West Virginia Supreme Court of Appeals just cannot work in this area. Indeed, it would be difficult to envision a clearer example of state and federal law in conflict. Accordingly, to preserve the principles of preemption, the decision below interpreting 30 U.S.C. § 955 to permit that conflict cannot stand.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA DECIDED DECEMBER 4, 2006

SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 33054.

Submitted: Oct. 25, 2006.
Decided: Dec. 4, 2006.

Jerrill DAVIS and Virginia Davis, et al.,

Plaintiffs

v.

EAGLE COAL AND DOCK COMPANY, et al.,

Defendants.

MAYNARD, Justice.

In this case, this Court answers two certified questions from the Circuit Court of Mingo County which we reformulate[1] as follows:

1. Are state law negligence, product liability, and breach of warranty claims against manufacturers of roof bolter dust

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1. *See* Syllabus Point 3 of *Kincaid v. Mangum*, 189 W.Va. 404, 432 S.E.2d 74 (1993) (recognizing this Court's power to reformulate certified questions).

collection systems preempted by the Federal Mine Safety and Health Act, 30 U.S.C. §§ 801, *et seq.*?

2. Are state law failure to warn claims against manufacturers of roof bolter dust collection systems preempted by the Federal Safety and Health Act, 30 U.S.C. §§ 801, *et seq.*?[2]

For the reasons that follow, we find that state law claims are not preempted by the Mine Safety and Health Act.

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2. The circuit court certified the following two questions:

> 1. Whether a determination of liability predicated on a roof bolter dust collection system design that has not been heretofore deemed permissible by MSHA/Secretary of Labor or which has not been heretofore otherwise approved by MSHA/Secretary of Labor is subject to preemption by virtue of the conflict between such a judicial determination and 30 U.S.C.A § 844 and/or the occupation of the field of roof bolter dust collection system design by Federal regulatory authorities.
>
> The circuit court answered this question in the affirmative.
>
> 2. Whether a determination of liability predicated on a failure to warn relating to a roof bolter's dust collection system via a warning not specifically prescribed by MSHA/Secretary of Labor is subject to preemption by virtue of the conflict between such a judicial determination and 30 U.S.C.A § 811 and/or occupation of the field of roof bolter dust collection system and dust control warnings by Federal regulatory authorities.
>
> The circuit court also answered this question in the affirmative.

Appendix A

I.

FACTS

The plaintiffs in several cases below were employed in various coal mining operations and now suffer from silicosis. There are several defendants below but the only one pertinent to these certified questions is J.H. Fletcher & Co., a manufacturer of roof bolters.

A roof bolter is a piece of heavy machinery that drills holes in the top of the coal mine shaft and then inserts bolts to prevent the roof of the mine shaft from collapsing on underground coal miners. These roof bolting machines are equipped with what is known as an integral dry dust suppression system (hereinafter "dust collector," "dust collection unit" or "dust collection system") the purpose of which is to collect silica released by the roof bolter's drilling and contain the dust in a filtration system to prevent coal miners from inhaling the dust.[3]

These dust collectors are heavily regulated by the federal Mine Safety and Health Administration (hereinafter "MSHA") under the federal Mine Safety and Health Act

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3. 30 C.F.R. § 33.2(e) defines "Dust-collector unit" as "a complete assembly of parts comprising apparatus for collecting the dust that results from drilling in rock in coal mines, and is independent of the drilling equipment." According to 30 C.F.R. § 33.2(g), "dust-collecting system means an assembly of parts comprising apparatus for collecting the dust that results from drilling in rock and is dependent upon attachment to other equipment for its operation."

(hereinafter "the Act") and its accompanying regulations which are detailed and comprehensive. Only dust collectors that meet all of the federal standards are certified as "permissible" for use in coal mines.[4] In order to obtain certification of a dust collector, a manufacturer must furnish a complete unit or system to the federal government for inspection and testing.[5] The government does not "test or investigate any dust collector that in its opinion is not constructed of suitable materials, that evidences faulty workmanship, or that is not designed upon sound engineering principles."[6] Finally, all end-product dust collector designs submitted are tested by the government to ensure that they meet a specific performance standard. This standard is based, in part, on whether the dust collector prevents the dissemination of harmful amounts of dust into the air.[7]

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4. The regulations governing dust collection systems are found in 30 C.F.R. §§ 33.1-33.38. According to § 33.1, in part, "[t]he regulations in this part set forth the requirements for dust collectors used in connection with rock drilling in coal mines to procure their certification as permissible for use in coal mines." "Permissible" means that the dust collector "conforms to the requirements of [Part 33], and that a certificate of approval to that effect has been issued." 30 C.F.R. § 33.2(a).

5. 30 C.F.R. § 33.6(g).

6. 30 C.F.R. § 33.20(a).

7. According to 30 C.F.R. § 33.20(b),

> Adequacy of design and construction of a unit or system will be determined in accordance with its ability (1) to

(Cont'd)

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Upon completing its testing of individual dust collectors, MSHA issues either a certificate of approval or a notice of disapproval.[8] A government-approved label is then placed on the certified unit, the content and location of which are controlled by federal regulations.[9] Finally, a party cannot

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> prevent the dissemination of objectionable or harmful concentrations of dust into a mine atmosphere, and (2) to protect against explosion and/or fire hazards of electrical equipment, except as provided in § 33.38(b).
>
> Concerning what constitutes objectionable or harmful concentrations of dust, 30 C.F.R. § 33.33(b) provides that "[u]nder each prescribed test condition, the net concentration of airborne dust at each drill operator's position shall not exceed 10 million particles (5 microns or less in diameter) per cubic foot of air[.]"

8. 30 C.F.R. § 33.10.

9. 30 U.S.C. § 811(a)(7) provides that,

> Any mandatory health or safety standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that miners are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure.

According to 30 C.F.R. § 33.9, in part:

> Certified dust-collecting systems shall bear labels or tags which shall contain the following: "Performance-tested

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Dust Collecting, System, MSHA File No. P/T __," and name of manufacturer, identifying numbers of the dust-collector parts, and description of the limitations for which performance is certified. MSHA will assign a P/T file number in the certification letter.

Further, 30 C.F.R. § 33.11 indicates that,

(a) A certificate of approval will be accompanied by a photograph of a design for an approval plate, bearing the emblem of the Mine Safety and Health Administration, the name of the applicant, the name of the unit, the approval number or space for the approval number (or numbers if permissibility if electrical parts is involved), spaces for the type and the serial numbers of the unit, conditions of approval, and identifying numbers of the dust collector parts. When deemed necessary by MSHA, an appropriate statement shall be added, giving the precautions to be observed in maintaining the unit in an approved condition.

(b) An approval plate for a unit designed for use in a nongassy coal mine shall state that any electrical parts are not certified for use in a gassy coal mine. (See § 33.38(c).)

(c) The applicant shall reproduce the design either as a separate plate or by stamping or molding it in some suitable place on each unit to which it relates. The size, type, and method of attaching and location of an approval plate are subject to the approval of MSHA. The method of affixing the plate shall not impair the dust-collection or explosion-proof features of the unit.

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unilaterally change any design, material, specification or use instruction of a certified dust collector unit or system without MSHA's prior approval.[10]

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(d) The approval plate identifies the unit, to which it is attached, as permissible, and is the applicant's guarantee that the unit complies with the requirements of this part. Without an approval plate, no unit has the status of 'permissible' under the provisions of this part.

(e) Use of the approval plate obligates the applicant to whom the certification of approval was granted to maintain the quality of each unit bearing it and guarantees that it is manufactured and assembled according to the drawings and specifications upon which a certificate of approval was based. Use of the approval plate is not authorized except on units that conform strictly with the drawings and specifications upon which the certificate of approval was based.

10. 30 C.F.R. § 33.12 provides:

If an applicant desires to change any feature of a certified unit or system, he shall first obtain MSHA's approval of the change, pursuant to the following procedure:

(a)(1) Application shall be made as for an original certificate, requesting that the existing certification be extended to cover the proposed changes, and shall be accompanied by drawings, specifications, and related data showing the changes in detail. . . .

(b) The application will be examined by MSHA to determine whether inspection and testing will be

(Cont'd)

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The plaintiffs allege in their actions against the defendant that the dust collection systems failed to protect the roof bolter operators from silica dust released during the machines' operations, and that any warnings pertaining to silica dust as a result of operating the machines were inadequate. The defendant subsequently moved, pursuant to West Virginia Rule of Civil Procedure 12(b)(6), for dismissal of the plaintiffs' actions based, among other things, on the defendant's claim that any state law is preempted by federal law.[11]

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> required. Testing will be necessary if there is a possibility that the modification may affect adversely the performance of the unit or system. MSHA will inform the applicant whether such testing is required and the components or materials to be submitted for that purpose.
>
> (c) If the proposed modification meets the requirements of this part and Part 18 of Subchapter D of this chapter if applicable, a formal extension of certification will be issued, accompanied by a list of new and corrected drawings and specifications to be added to those already on file as the basis for the extension of certification.

11. We have previously recognized that, pursuant to W. Va.Code § 58-5-2 (1998), a question of law arising from a challenge of the sufficiency of a pleading may be certified to this Court. Further, the purpose of a motion to dismiss under Rule 12(b)(6) is to test the formal sufficiency of the complaint. Therefore, a question of law arising from a Rule 12(b)(6) motion is appropriate for certification. *See Zelenka v. City of Weirton,* 208 W.Va. 243, 539 S.E.2d 750 (2000).

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By order dated June 17, 2005, the circuit court certified the issue of federal preemption to this Court.[12] As noted above, the circuit court found that federal law preempts the plaintiffs' claims.[13]

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12. Concerning the circuit court's and this Court's authority to determine the existence of federal preemption in this case, we have held that, "West Virginia state courts have subject matter jurisdiction over federal preemption defenses." Syllabus Point 3, *State ex rel. Orlofske v. City of Wheeling*, 212 W.Va. 538, 575 S.E.2d 148 (2002).

13. In answering the certified questions, the circuit court reasoned, in part, as follows:

> Before a dust collector . . . system can be used in an underground coal mine, MSHA must approve it as "permissible." The Agency has promulgated comprehensive regulations in the Code of Federal Regulations regarding the control of dust caused by roof drilling, the design of permissible dust collectors, warnings associated with the dust hazard in an underground coal mine or any other aspect of this "field of regulation." 30 C.F.R. § 33.1 to 33.38.
>
> Even though the Court finds that Congress has legislated comprehensively to occupy the entire field of regulation relating to the design of dust collecting systems and warnings, the Court recognizes that the state has the right to supplement federal law. However, West Virginia has not added to or otherwise supplemented these regulations; plaintiffs do not point to any applicable state statute or regulation applicable to their claims against Fletcher.

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Because all of the claims asserted by plaintiffs against Fletcher-product design and failure to warn-are predicated upon a theory that the dust collecting system incorporated into the Fletcher roof bolting machine was defective, these cases qualify for application of the second prong of the doctrine of implied preemption. Congress expressly reserved unto itself the form and substance of "labels or other appropriate forms or warnings as are necessary to insure that miners are apprised of all hazards to which they are exposed" with respect to the exposure to hazardous dust in an underground coal mine. 30 U.S.C. § 811.

Further, because plaintiffs allege use issues such as clogged drill steels, hoses and filters, the Court also relies upon and concludes that 30 C.F.R. § 33.11(a) applies to the duty to warn issue when it provided: "When deemed necessary by MSHA, an appropriate statement shall be added, giving precautions to be observed in maintaining the unit in an approved condition." The Court observes that this same regulation requires: "[a] certificate of approval will be accompanied by a photograph of a design for an approval plate, bearing the emblem of the Mine Safety and Health Administration, the name of the applicant, the name of the unit, the approval number or space for the approval number (or numbers if permissibility of electrical parts is involved) spaces for the type and the serial numbers of the unit, conditions of approval and identifying numbers of the dust collector parts." 30 C.F.R. § 33.11(a).

A state law, derived from a verdict in one or more of these cases, would conflict with federal law regarding

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II.

STANDARD OF REVIEW

It is well settled that this Court's review of a circuit court's answer to a certified question is *de novo*. *See* Syllabus Point 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996) (holding that "[t]he appellate standard of review of questions of law answered and certified by a circuit court is *de novo*").

III.

DISCUSSION

The authority of federal law to preempt state law is found in the United States Constitution in what is known as the Supremacy Clause which provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in

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> the design of the dust collecting system and warnings because it would be impossible to comply with both and because state law stands as an obstacle to the accomplishment and execution of congressional objectives. (Citations omitted).

> the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. This Court has held that "[t]he Supremacy Clause of the United States Constitution, Article VI, Clause 2, invalidates state laws that interfere with or are contrary to federal law." Syllabus Point 1, *Cutright v. Metropolitan Life Ins. Co.*, 201 W.Va. 50, 491 S.E.2d 308 (1997).

It is also true, however, that "[o]ur law has a general bias against preemption." *General Motors Corp. v. Smith*, 216 W.Va. 78, 83, 602 S.E.2d 521, 526 (2004). "[B]oth this Court and the U.S. Supreme Court have explained that federal preemption of state court authority is generally the exception, and not the rule." *In re: West Virginia Asbestos Litigation*, 215 W.Va. 39, 42, 592 S.E.2d 818, 821 (2003). "Given the importance of federalism in our constitutional structure . . . we entertain a strong presumption that federal statutes do not preempt state laws; particularly those laws directed at subjects-like health and safety-'traditionally governed' by the states." *Law v. General Motors Corp.*, 114 F.3d 908, 909-910 (9th Cir.1997),*quoting CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 1737, 123 L.Ed.2d 387 (1993). Therefore, "preemption is disfavored in the absence of convincing evidence warranting its *86 application." *Hartley Marine Corp. v. Mierke*, 196 W.Va. 669, 673, 474 S.E.2d 599, 603 (1996). Said another way, "pre-emption will not lie unless it is 'the clear and manifest purpose of Congress.' " *Law*, 114 F.3d at 910, *quoting Easterwood, id.* For these reasons, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did

not intend to displace state law." *State ex rel. Orlofske v. City of Wheeling,* 212 W.Va. 538, 543, 575 S.E.2d 148, 153 (2002), *quoting Maryland v. Louisiana,* 451 U.S. 725, 746, 101 S.Ct. 2114, 2129, 68 L.Ed.2d 576, 595 (1981).

This Court has previously recognized that "[i]n any preemption analysis, the focus of the inquiry is on congressional intent." *Hartley Marine Corp.,* 196 W.Va. at 674, 474 S.E.2d at 604 (citations omitted). We have also explained that "[p]reemption may either be explicit, *i.e.,* set forth in the federal statute, or implied." *In re: West Virginia Asbestos Litigation,* 215 W.Va. at 43, 592 S.E.2d at 822. Implied preemption may take two forms.

> [I]n the absence of explicit statutory language signaling an intent to pre-empt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the states to supplement federal law, or where the state law at issue conflicts with federal law, either because it is impossible to comply with both or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives[.]

Hartley Marine Corp., 196 W.Va. at 674, 474 S.E.2d at 604, *quoting Northwest Cent. Pipeline Corp. v. Kansas Corp. Comm'n,* 489 U.S. 493, 509, 109 S.Ct. 1262, 1273, 103 L.Ed.2d 509 (1989).

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The defendant argues first that field preemption exists in the instant case. Specifically, the defendant opines in its brief to this Court that,

> compliance with 30 U.S.C.A. § 844[14] and [30 C.F.R. §§ 33.1- 33.38] constitutes field preemption. Federal authority completely occupies the field of law with respect to roof bolters and respirable dust exposures by the foregoing and by the fact that manufacturers are prohibited from making *any* design, instruction, labeling, component part or any other change without first having MSHA's approval. 30 C.F.R. § 33.12.[15] . . . Because Congress and MSHA has

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14. According to 30 U.S.C. § 844,

> The dust resulting from drilling in rock shall be controlled by the use of permissible dust collectors, or by water or water with a wetting agent, or by ventilation, or by any other method or device approved by the Secretary which is at least as effective in controlling such dust. Respiratory equipment approved by the Secretary and the Secretary of Health and Human Services shall be provided persons exposed for short periods to inhalation hazards from gas, dusts, fumes, or mist. When the exposure is for prolonged periods, other measures to protect such persons or to reduce the hazard shall be taken.

15. According to 30 C.F.R. § 33.12, in part, "[i]f an applicant desires to change any feature of a certified unit or system, he shall first obtain MSHA's approval of the change[.]"

> [sic] completely occupied the field of regulation as to this product, any State damages action would directly conflict with the same. This conflict is expressly prohibited. [30 U.S.C.A. § 955] (footnotes added).

We disagree with the defendant and find that field preemption does not exist in this case. As stated above, preemption is only to be inferred "[i]n the absence of explicit statutory language signaling an intent to pre-empt." *Hartley Marine Corp.*, 196 W.Va. at 674, 474 S.E.2d at 604. In the instant case, however, there is explicit statutory language signaling Congress's intent to preempt state law insofar as it conflicts with federal law. This explicit statutory language is found in 30 U.S.C. § 955 which states:

> (a) No State law in effect on December 30, 1969 or which may become effective thereafter shall be superseded by any provision of this chapter or order issued or any mandatory health or safety standard, except insofar as such State law is in conflict with this chapter or with any order issued or any mandatory health or safety standard.
>
> (b) The provisions of any State law or regulation in effect upon the operative date of this chapter, or which may become effective thereafter, which provide for more stringent health and safety standards applicable to coal or other mines than do the provisions of this chapter or any order issued or any mandatory health or safety standard shall not thereby be construed or held to be in

> conflict with this chapter. The provisions of any State law or regulation in effect December 30, 1969, or which may become effective thereafter, which provide for health and safety standards applicable to coal or other mines for which no provision is contained in this chapter or in any order issued or any mandatory health or safety standard, shall not be held to be in conflict with this chapter.

Therefore, because Congress has clearly expressed its intent not to preempt all state law or to occupy the entire field, we conclude that field preemption does not exist in this case.

Second, the defendant asserts that express preemption exists which is indicated by Congress's promulgation of regulations that specify the design, engineering, construction, and performance criteria for dust collectors. Essentially, the defendant's argument hinges on the fact that the federal regulations are detailed, comprehensive, and mandatory. According to the defendant, a fair reading of this comprehensive regulatory scheme leads to the inescapable conclusion that Congress clearly intended to preempt state laws pertaining to dust collectors.

We find no merit to the defendant's argument. Again, because Congress included an express preemption provision in the Mine Safety and Health Act, this Court does not find it necessary to infer Congressional intent from regulations that do not specifically address preemption. According to the clear provisions of § 955(a), only state laws that are in

conflict with the federal standards for permissible dust collectors are superseded by the federal standards. Further, pursuant to the plain language of § 955(b), state laws or regulations that provide for more stringent health and safety standards than do the federal provisions shall not be construed to be in conflict with those provisions. It is obvious to this Court from the clear language in § 955(a) and (b) that Congress did not intend to preempt State laws that provide for more stringent health and safety standards than the federal laws. Therefore, we find that Congress did not intend to preempt state law claims that may hold the defendant's dust collection system to a more stringent standard than federal law.

The defendant contends, however, that paragraph (b) of § 955 is not applicable to its dust collection system. The defendant points out that § 955(b) applies specifically to health and safety standards "applicable to coal or other mines," which, says the defendant, refers to the property from which coal is mined and not to manufacturers of dust collectors. We decline to read the language of § 955(b) so narrowly. According to 30 U.S.C. § 802(h)(1), "coal or other mine" means, among other things, "equipment" and "machines" "used in, or to be used in ... the work of extracting ... minerals." A roof bolter with a dust collection system is a piece of equipment or machinery used in the work of mining underground coal. Specifically, it makes the underground mining of coal possible by preventing roof collapses. It also makes the job of mining underground coal safer by limiting the amount of respirable dust in the air

resulting from roof bolting operations.[16] But even absent the definition of the language "coal or other mine" in 30 U.S.C. § 802(h)(1), it is apparent to this Court that any common sense construction of the phrase "applicable to coal or other mines" includes machinery, such as a roof bolter, which is integral to underground mining operations. Thus, we find no reason, in the absence of express language to the contrary, to exclude roof bolters from the application § 955(b).

The defendant further avers that state law pertaining to dust collectors is preempted under the principles of conflict preemption. Specifically, according to the defendant, the distinction between 30 U.S.C. § 955(a) and (b) "spells out the clear and firm expression of Congressional intent to preserve conflict preemption principles for a narrow category of persons and entities involved in the mining industry, other than coal or other mines." The defendant apparently defines the term "conflict" for the purposes of conflict preemption to mean "different." In other words, according to the defendant, any state law or jury verdict requiring a *different* standard than that set forth in federal law is preempted. The defendant supports this proposition by citing specific language in both the Act and its accompanying federal regulations. For example, the defendant cites 30 U.S.C. § 811(a)(6)(A) which provides:

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16. It is also the contention of the defendant that absent the distinction between § 955(a) and § 955(b), there would have been no reason for Congress to have enacted both subsections (a) and (b). We disagree. We believe instead that when the subsections are read *in pari materia*, subsection (a) sets forth the general rule that state laws not in conflict with federal law are not superseded, and subsection (b) defines what constitutes "conflict" under subsection (a).

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> The Secretary, in promulgating mandatory standards dealing with toxic materials or harmful physical agents under this subsection, shall set standards which most adequately assure on the basis of the best available evidence that no miner will suffer material impairment of health or functional capacity even if such miner has regular exposure to the hazards dealt with by such standard for the period of his working life. Development of mandatory standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the miner, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the mandatory health or safety standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

It is the defendant's position that the use of the term "mandatory" in this code section indicates that any state law or jury verdict that deviates from the federal standards is preempted. We reject the defendant's reasoning.

This Court has explained that "conflict preemption[ ] [occurs] where 'compliance with both federal and state regulations is a physical impossibility,' or where state law

'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]" *Hartley Marine Corp.*, 196 W.Va. at 674, 474 S.E.2d at 604, *citing Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98, 112 S.Ct. 2374, 2383, 120 L.Ed.2d 73 (1992). We do not believe that the defendant's compliance with both a jury verdict that requires more stringent standards than federal law and its compliance with less stringent federal standards is a physical impossibility. Logically, compliance with a more stringent state standard also indicates compliance with a less stringent federal standard.

Further, we do not believe that a jury verdict requiring a different standard than that set forth in the federal regulations would frustrate the objectives and execution of the federal standard. The purposes of the Mine Safety and Health Act are spelled out in 30 U.S.C. § 801(g), which provides,

> it is the purpose of this chapter (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health and Human Services and the Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal or other miners; (2) to require that each operator of a coal or other mine and every miner in such mine comply with such standards; (3) to cooperate with, and provide assistance to, the States in the development and enforcement of effective State coal or other mine health and safety programs; and (4) to improve and expand, in cooperation with the States and

> the coal or other mining industry, research and development and training programs aimed at preventing coal or other mine accidents and occupationally caused diseases in the industry.

This Court fails to see how state enforcement of a more stringent standard pertaining to dust collectors would frustrate these purposes. Essentially, "the purpose of the Federal*89 Coal Mine Health and Safety Act is to protect the safety of the miner." *Westmoreland Coal Co. v. Federal Mine, Etc.*, 606 F.2d 417, 419-420 (4th Cir.1979), *see also Estate of Bernaldes v. U.S.*, 877 F.Supp. 301, 308 (W.D.Va.1995), *affirmed*, 81 F.3d 428 (4th Cir.1996) (recognizing that "protecting the health and safety of the nation's coal miners is one of the purposes of the Act"). Quite frankly, it seems to us that enforcement of a more stringent standard governing dust collectors would have the effect of better protecting the health and safety of miners by further limiting the amount of respirable silica that they breathe while operating roof bolters. Accordingly, we conclude that conflict preemption does not operate to prevent state law claims against the defendant.

Next, the defendant posits that this Court's decision in *In re: West Virginia Asbestos Litigation*, in which we found that state tort law claims against manufacturers of parts or components of railroad locomotives are preempted by the federal Locomotive Boiler Inspection Act, § 20701, *et seq.* supports a finding of preemption in the instant case. According to the defendant, the inspection, testing, approval, and performance regulations for dust collectors are more

precise, detailed, and onerous than the regulations in the railroad preemption cases.

This Court does not believe that *In re: West Virginia Asbestos Litigation* is analogous to the present case. First, as seen above, the Mining Safety and Health Act has an express preemption provision that expressly preserves state laws that do not conflict with federal law. In contrast, the Locomotive Inspection Act is silent on preemption.[17] Moreover, an important practical basis for finding implied preemption in railroad cases is the unique interstate nature of the railroad business.

This broad preemptive sweep is necessary to maintain uniformity of railroad operating standards across state lines. Locomotives are designed to travel long distances, with most railroad routes wending through interstate commerce. The virtue of uniform national regulation "is self-evident: locomotive companies need only concern themselves with

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17. In its brief, the defendant, in its discussion of *In re: West Virginia Asbestos Litigation,* points out that the preemption clause in the Federal Railroad Safety Act, 49 U.S.C. §§ 20101, *et seq.*, like the preemption clause in the Mine Safety and Health Act, expressly recognizes conflict preemption. Significantly, however, *In re: West Virginia Asbestos Litigation* concerned preemption under the Locomotive Inspection Act and not the Railroad Safety Act. Courts have found that "Congress did not intend the preemption provision of the Railroad Safety Act to modify the total-preemptive effect of the Locomotive Inspection Act." *Consol. Rail Corp. v. Pennsylvania Pub. Util.*, 536 F.Supp. 653, 657 (E.D.Pa.1982), *affirmed,* 696 F.2d 981 (3rd Cir.1982), *affirmed,* 461 U.S. 912, 103 S.Ct. 1888, 77 L.Ed.2d 280 (1983).

one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state." *Southern Pac. Transp. Co. v. Oregon PUC*, 9 F.3d 807, 811 (9th Cir.1993); *see also R.J. Corman R.R. v. Palmore*, 999 F.2d 149, 152 (6th Cir.1993) ("Th[e] lasting history of pervasive and uniquely-tailored congressional action indicates Congress's general intent that railroads should be regulated primarily on a national level through an integrated network of federal law."). . . .

> . . . the purpose of tort liability is to induce defendants to conform their conduct to a standard of care established by the state. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247, 79 S.Ct. 773, 780-81, 3 L.Ed.2d 775 (1959) ("The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.").... If each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state.

Law, 114 F.3d 908, 910-11. These same considerations do not apply to the dust collectors at issue.

The defendant further argues that its faithful compliance with all of the federal standards that regulate dust collectors should shield it from claims that its dust collectors are defective. While this Court agrees that compliance with

federal standards is compelling evidence on the defendant's behalf in any state law claim,[18] such claims are not completely foreclosed. As set forth above, Congress has clearly expressed its intent that states may adopt more stringent standards than those found in the Mining Safety and Health Act. This Court must give effect to Congressional intent. Moreover, we are confident that our decision herein supports the compelling public policy of encouraging manufacturers of dust collection units to continually strive to make those units safer than what is currently required by the federal Act.

Finally, the defendant opines that state law cannot require a more demanding standard governing dust collectors because federal regulations represent "the gold standard." We believe that to accept the defendant's argument is to deny the possibility of technological progress in the manufacture of dust collectors. Technology that represented the gold standard a short time ago may no longer represent the gold standard today. The federal regulations themselves recognize that "all possible designs, arrangements, or combinations of components and materials [of dust collectors] cannot be foreseen." 30 C.F.R. § 33.20. We believe that by permitting states to adopt more stringent dust collector standards than those found in the federal regulations, Congress has implicitly recognized that dust collector systems may be manufactured that actually exceed federal safety regulations.[19]

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18. *See* footnote 17, *infra.*

19. The defendant also supports it argument in favor of preemption by asserting that no state, including West Virginia, has ever adopted a law or regulation regarding the performance, testing, (Cont'd)

In sum, after reviewing the language of the Mine Safety and Health Act and its accompanying regulations, we conclude that our basic presumption that Congress did not intend to displace state law has not been rebutted by convincing evidence to the contrary. Quite simply, we do not believe that Congress's purpose to preempt all state law regulating dust collectors is clear and manifest. Accordingly, we hold that state tort law, product liability, breach of warranty, and failure to warn claims against manufacturers of roof bolter dust collection systems are not preempted by the Federal Mine Safety and Health Act, 30 U.S.C. § 801, *et seq.*[20]

(Cont'd)
approval, or certification of dust collectors. In light of our reading of the Mine Safety and Health Act to indicate that states may adopt laws or regulations that are more stringent than the federal Act, we do not find the fact that states have not adopted more stringent regulations to be legally significant.

20. This Court wishes to emphasize that our sole task in this case is to decide the narrow legal issue of federal preemption and not to determine whether the plaintiffs can actually maintain an action against the defendant. At this point in the litigation below, evidence has not yet been adduced and we essentially have only the bare allegations of the parties. We note, however, that if the defendant is able to show that it complied with all applicable federal regulations in the manufacture of its dust collector units, this showing may be a compelling defense to the claims of the plaintiffs.

IV.

CONCLUSION

For the reasons stated above, we answer the reformulated certified questions as follows:

1. Are state law negligence, product liability, and breach of warranty claims against manufacturers of roof bolter dust collection systems preempted by the Federal Mine Safety and Health Act, 30 U.S.C. §§ 801, *et seq.*?

Answer: No.

2. Are state law failure to warn claims against manufacturers of roof bolter dust collection systems preempted by the Federal Mine Safety and Health Act, 30 U.S.C. §§ 801, *et seq.*?

Answer: No.

Certified questions answered.

APPENDIX B — ORDER OF THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA CERTIFYING QUESTIONS TO THE WEST VIRGINIA SUPREME COURT OF APPEALS ENTERED JUNE 17, 2005

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

Civil Action No. 04-C-140
Hon. Michael Thornsbury, Judge

JERRIL DAVIS and VIRGINIA DAVIS,

Plaintiffs,

v.

EAGLE COAL AND DOCK COMPANY, et al.

Defendants.

Civil Action No. 04-C-222
Hon. Michael Thornsbury, Judge

DAVID HOLDREN and SHARON HOLDREN,

Plaintiffs,

v.

MABEN ENERGY CORPORATION, et al.

Defendants.

Appendix B

Civil Action No. 04-C-223
Hon. Michael Thornsbury, Judge

SAMUEL E. COAKLEY and BARBARA COAKLEY,

Plaintiffs,

v.

WESTMORELAND COAL COMPANY, et al.

Defendants.

Civil Action No. 04-C-289
Hon. Michael Thornsbury, Judge

RICKY PRINCE and DIANA PRINCE,

Plaintiffs,

v.

EASTERN ASSOCIATED COAL CORP., et al.

Defendants.

Civil Action No. 04-C-322
Hon. Michael Thornsbury, Judge

DAVID JOHNSON and JUDY JOHNSON,

Plaintiffs,

v.

ISLAND CREEK COAL COMPANY, et al.

Defendants.

Appendix B

Civil Action No. 04-C-307
Hon. Michael Thornsbury, Judge

DOUGLAS MULLINS and WILMA MULLINS,

Plaintiffs,

v.

J.H. FLETCHER & CO., et al.

Defendants.

Civil Action No. 04-C-308
Hon. Michael Thornsbury, Judge

GLEN MOORE and IRENE MOORE,

Plaintiffs,

v.

J.H. FLETCHER & CO., et al.

Defendants.

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ORDER CERTIFYING QUESTIONS TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

Findings of Fact

The plaintiffs in these cases contend that they were exposed to silica dust while they were employed in various coal mining operations and now suffer from a lung disease known as Silicosis. Silica is not present in every coal mine, but it is alleged to have been present in all of the mines in which the plaintiffs work. Silica dust is created during the roof bolting process: a hole is drilled into the mine roof and a bolt is inserted to secure the mining area to prevent roof falls and other incidents. During the drilling, the above layers of rock and material are disturbed. Often these layers include silica-based minerals such as sandstone, and thus silica dust may be introduced into the work environment.

The plaintiffs have asserted a product liability claim against defendant J.H. Fletcher & Co. ("Fletcher"), a manufacturer of roof bolting machines. Plaintiffs allege the Fletcher machines were defective because they failed to protect the machine operators from the silica dust released during the mining operations. Specifically, the dust collection systems and the warnings relevant to silica dust as a result of operating a Fletcher machine were inadequate.

Fletcher contends that Federal Law strictly regulates the design, manufacture, and operation of its equipment, and thus, under the doctrine of preemption, it cannot be subject to a determination of liability under West Virginia statutory or common law. Accordingly, Fletcher moves to dismiss the claims against it pursuant to W.Va.R.Civ.P. 12 (c).

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Fletcher's argument is as follows: The United States Department of Labor, Mine Health and Safety Administration ("MSHA" or "Agency") prohibits the use of any roof bolting machine unless its dust collection system has been approved by the Agency. Further, the subject of dust hazards has been comprehensively regulated by the United States. 30 U.S.C. §§ 811, 844, 845 and 863; 30 C.F.R. § 33.1 to 33.38. West Virginia has not supplemented these statutes and regulations with any corresponding or additional state provisions, even though it has had the opportunity. Therefore, the "sole source for defining state law would be a trial verdict adverse to Fletcher." Such a determination would necessarily be based upon a state common law doctrine concerning alternative design of the dust collection system, or a common law failure to warn. Compliance with state common law regarding dust collecting systems would frustrate and be at odds with the objectives of Congress as set forth in the federal statutes and regulations, and is therefore impermissible.

Plaintiffs counter that the holding in *United Mine Workers of America v. Miller*, 170 W.Va. 177, 291 S.E.2d 673 (1982) recognizes that civil actions under the Federal Mine Safety and Health Act are allowed. Plaintiffs also cite to cases where compliance with federal labeling guidelines for other products were followed, yet tort claims were permitted to proceed. See, e.g., *Mazur v. Merck Co.*, 742 F.Supp. 239 (E.D.Pa. 1990).

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Conclusions of Law

The Supremacy Clause of the United States Constitution, Article IV, Clause 2, invalidates state laws that interfere with or are contrary to federal law. *In Re: West Virginia Asbestos Litigation*, 215 W.Va. 39, 592 S.E.2d 818 (2003). In enacting the applicable legislation, Congress required the United States Secretary of Labor to "develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal and other mines." 30 U.S.C. § 811

Moreover, Congress has comprehensively legislated regarding the health and safety of coal miners. 30 U.S.C. § 801. Congress expressly declared its intent at 30 U.S.C. § 801(a-g): Congress declares that:

a. the first priority and concern of all in the coal and other mining industry must be health and safety of the most precious resource – the miner;

b. deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal and other mines cause grief and suffering to the miners and to their families;

c. there is an urgent need to provide a more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;

d. the existence of unsafe and unhealthful conditions and practices in the Nation's coal or other mines is a serious impediment to the future growth of the coal or other mining industry and cannot be tolerated;

e. the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines;

f. the disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused diseases unduly impedes and burdens commerce; and

g. it is the purpose of this chapter (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health and Human Services and the Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal and other miners; (2) to require that each operator of a coal or other mine and every miner in such mine comply with such standards; (3) to cooperate with, and safety programs; and (4) to improve and expand, in cooperation with the States and the coal or other mining industry, research and development and training programs aimed at preventing coal or other mine accidents and occupationally caused diseases in the industry.

Based upon the foregoing language, it is clear that Congress intended to occupy this field of regulation.

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Before a dust collector or dust collection system can be used in an underground coal mine, MSHA must approve it as "permissible." The Agency has promulgated comprehensive regulations in the Code of Federal Regulations regarding the control of dust caused by roof drilling, the design of permissible dust collectors, warnings associated with the dust hazard in an underground coal mine or any other aspect of this "field of regulation." 30 C.F.R. § 33.1 to 33.38.

Even though the Court finds that Congress has legislated comprehensively to occupy the entire field of regulation relating to the design of dust collecting systems and warnings, the Court recognizes that the state has the right to supplement federal law. However, West Virginia has not added to or otherwise supplemented these regulations; plaintiffs do not point to any applicable state statute or regulation applicable to their claims against Fletcher.

Because all of the claims asserted by plaintiffs against Fletcher — product design and failure to warn — are predicated upon a theory that the dust collecting system incorporated into the Fletcher roof bolting machine was defective, these cases qualify for application of the second prong of the doctrine of implied preemption. Congress expressly reserved unto itself the form and substance of "labels or other appropriate forms or warnings as are necessary to insure that miners are apprised of all hazards to which they are exposed" with respect to the exposure to hazardous dust in an underground coal mine. 30 U.S.C. § 811.

Further, because plaintiffs allege use issues such as clogged drill steels, hoses and filters, the Court also relies upon and concludes that 30 C.F.R. § 33.11(a) applies to the duty to warn issue when it provided: "When deemed necessary by MSHA, an appropriate statement shall be added, giving the precautions to be observed in maintaining the unit in an approved condition." The Court observes that this same regulation requires: "[a] certificate of approval will be accompanied by a photograph of a design for an approval plate, bearing the emblem of the Mine Safety and Health Administration, the name of the applicant, the name of the unit, the approval number or space for the approval number (or numbers if permissibility of electrical parts is involved) spaces for the type and the serial numbers of the unit, conditions of approval and identifying numbers of the dust collector parts." 30 C.F.R. § 33.11(a)

A state law, derived from a verdict in one or more of these cases, would conflict with federal law regarding the design of the dust collecting system and warnings because it would be impossible to comply with both and because state law stands as an obstacle to the accomplishment and execution of congressional objectives. *In re: West Virginia Asbestos Litigation*, 215 W. Va. 39, 592 S.E.2d 818 (2003); *Hartley Marine Corp. v. Mierke*, 196 W. Va. 669, 674, 474 S.E.2d 599, 604 (1996) *cert. denied sub. nom. Hartley Marine Corp v. Paige*, 519 U.S. 1108, 117 S.Ct. 942, 136 L.Ed.2d 832 (1997); *Northwest Cent. Pipeline Corp. v. Kansas Corp. Comm'n*, 489 U.S. 493, 509, 109 S.Ct. 1262, 1273 103 L.Ed. 509 (1989).

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West Virginia Code § 58-5-2 provides,

> Any question of law, including, but not limited to, questions arising upon the sufficiency of a summons or return of service, upon a challenge of the sufficiency of a pleading or the venue of the circuit court, upon the sufficiency of a motion for summary judgment where such motion is denied, or a motion for judgment on the pleadings, upon the jurisdiction of the circuit court of a person or subject matter, or upon failure to join an indispensable party, may, in the discretion of the circuit court in which it arises, be certified by it to the supreme court of appeals for its decision, and further proceedings in the case stayed until such question shall have been decided and the decision thereof certified back. The procedure for processing questions certified pursuant to this section shall be governed by rules of appellate procedure promulgated by the supreme court of appeals.

The Court finds that the issues presented by the defendant, J.H. Fletcher & Co. are such that the Court finds it appropriate to seek the guidance of the West Virginia Supreme Court of Appeals. Accordingly, the Court **CERTIFIES** the following questions of law to the West Virginia Supreme Court of Appeals, together with proposed answers:

1. Whether a determination of liability predicated on a roof bolter dust collection system design that has not been heretofore deemed permissible by MSHA/Secretary of

Labor or which has not been heretofore otherwise approved by MSHA/Secretary of Labor is subject to preemption by virtue of the conflict between such a judicial determination and 30 U.S.C.A. § 844 and/or the occupation of the field of roof bolter dust collection system design by Federal regulatory authorities.

ANSWER: YES.

2. Whether a determination of liability predicated on a failure to warn relating to a roof bolter's dust collection system via a warning not specifically prescribed by MSHA/Secretary of Labor is subject to preemption by virtue of the conflict between such a judicial determination and 30 U.S.C.A. § 811 and/or occupation of the field of roof bolter dust collection system and dust control warnings by Federal regulatory authorities.

ANSWER: YES.

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Order

WHEREFORE, the Court **ORDERS** that the above questions of law are **CERTIFIED** to the West Virginia Supreme Court of Appeals. The defendant, J.H. Fletcher & Co. is **DIRECTED** to prepare the appropriate and necessary petition, pursuant to Rule 13 of the West Virginia Rules of Appellate Procedure.

The clerk is **DIRECTED** to send teste copies of this order to all parties of record. **ENTERED**, this the 17th day of June 2005.

s/ Michael Thornsbury
The Honorable Michael Thornsbury
Chief Judge, 30th Judicial Circuit

Supreme Court, U.S.
FILED
MAY 7 - 2007
OFFICE OF THE CLERK

No. 06-1206

IN THE

Supreme Court of the United States

J.H. FLETCHER & CO.,

Petitioner,

v.

JERRILL DAVIS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review the West Virginia Supreme Court's interlocutory decision below under 28 U.S.C. § 1257, under which this Court has jurisdiction to review only "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had[.]"

2. If the Court determines that it has jurisdiction, then the question on the merits is whether this Court should review the unanimous decision of the West Virginia Supreme Court, holding that the federal Mine Safety and Health Act does not preempt Respondents' state common-law claims arising from injuries caused by the operation of machinery manufactured by Petitioner, where (a) no appellate court has ever adopted a contrary view; and (b) the Act's "savings clause," 30 U.S.C. § 955(a) and (b), expressly authorizes the enforcement of any State law or regulation that is more stringent than federal standards.

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STATEMENT OF THE CASE

Respondents suffer from the incurable lung disease silicosis as a result of their work as underground miners in West Virginia coal mines. These coal miners performed different tasks, including operating roof bolting machines manufactured by Petitioner J.H. Fletcher & Co. These machines drill into rock laden with quartz and generate significant levels of silica dust that miners breathe into their lungs. Tragically, excess exposures to silica dust in these coal mines continue to be routine, and several respondents have advanced forms of silicosis, including one former roof bolter who recently underwent a double lung transplant. Respondents brought these civil actions alleging negligence, product design and failure to warn claims against Fletcher because it either installed no dust collection or suppression systems on its roof bolting machines, or installed systems that were defective and failed to adequately limit exposures to silica dust.

After these lawsuits were filed in Mingo County, West Virginia, Fletcher moved to dismiss in each of the pending cases based, among other things, on federal preemption. The court found that federal law impliedly preempts the claims in these cases, but certified the issues to the West Virginia Supreme Court of Appeals and stayed the cases.

The West Virginia Supreme Court of Appeals reversed unanimously, holding that the federal Mine Safety and Health Act ("MSHA") does not preempt the common law personal injury claims alleged in these cases, and specifically rejected each of Fletcher's preemption arguments. First, the court found that 30 U.S.C. § 955(b), which provides that "State law or regulation[s]" more stringent than the MSHA shall

not be deemed in conflict with the MSHA, signaled Congress's intent to allow for these state common law claims. Second, the court found that although there are detailed federal regulations applicable to roof bolting machinery, the § 955(b)'s clear text, along with the absence of preemptive language in the remainder of the statute or regulations, indicated that Congress did not intend to preempt state common law personal injury claims. Moreover, the court found that the MSHA provides unambiguously that the savings clause in § 955(b) applies to coal mine operators *and* equipment manufacturers, such as Petitioner Fletcher. Third, the court found that conflict preemption does not exist because compliance with more stringent state health and safety standards is not impossible. Fourth, the court held that the MSHA's plain language reveals that Congress anticipated non-uniform results by including the savings clause in § 955, which specifically authorizes more stringent state health and safety standards, and by the inclusion of other language in §§801 and 953, which encourages states to develop and enforce more stringent laws and regulations that will further protect the health and safety of coal miners. Finally, the court held that state law claims will serve the important purpose of encouraging roof bolting machine manufacturers to strive to make their products safer. Indeed, the court noted that the federal regulations recognized that dust collection systems may be manufactured in ways that exceed federal regulations.

REASONS FOR DENYING THE PETITION

I. THIS COURT DOES NOT HAVE JURISDICTION.

This Court's review of state-court decisions is limited to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). Here, the ruling of the West Virginia Supreme Court of Appeals reformulated and answered two certified questions, which effectively reversed the trial court's proposed dismissal of the case and remanded the case for further proceedings. Thus, the decision below is not a "final judgment" within the meaning of section 1257.

This Court has identified four exceptions to section 1257's finality requirement. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-87 (1975). As to the first three, this Court recognizes exceptions where (1) "the federal issue is conclusive or the outcome of further proceedings preordained," (2) the federal issue "will survive and require decision regardless of the outcome of further state court proceedings," and (3) "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 479-81; *see also Jefferson v. City of Tarrant*, 522 U.S. 75, 82 (1997). As to these three categories, the judgment involved here does not even arguably apply. If Fletcher prevails on remand, the question presented will no longer require decision. Thus, as in *Jefferson v. City of Tarrant*, "[t]he outcome of those further proceedings could moot the federal question" presented here. *Id.* at 78. On the other hand, if Fletcher does not prevail on remand, it "will be free to seek [Supreme Court] review when the state-court proceedings reach an end." *Id.* at 82-83.

The fourth *Cox Broadcasting* exception applies only when two requirements are met. First, the state court judgment must represent the final word within the state court system on a federal issue, "with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." Second, "a refusal immediately to review the state-court decision" must present a risk of "seriously erod[ing] federal policy." *Cox Broadcasting*, 420 U.S. at 482-83.

This category is also inapplicable because "refusal immediately to review the state-court decision" presents no risk of "seriously erod[ing] federal policy." As we explain further below, the decision of the West Virginia Supreme Court of Appeals was correct. But even if were not, a trial on the merits of Respondents' claims, with a right of review in this Court if Respondents were to prevail, would not run contrary to, let alone "seriously erode," federal policy. After all, the MSHA specifically permits enforcement of state laws and regulations that are more stringent than comparable federal laws and regulations; thus, even assuming that a small category of state tort claims are preempted by the MSHA, the Act, in general, sees federal law as a floor, not a ceiling, vis-a-vis state law. *See Geier v. American Honda Motor Company, Inc.*, 529 U.S. 861, 870 (2000) ("And it [National Traffic and Motor Vehicle Safety Act] thereby preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor").

Thus, it is difficult to see how any one pending personal-injury case involving injuries arising from underground coal mining could present the type of "serious erosion" contemplated by this Court in *Cox*. *See Florida v. Thomas*, 532 U.S. 774, 780 (2001) (rejecting notion that alleged misinterpretation of Fourth Amendment should be reviewed because "the State can make no claim of serious erosion of federal policy that is not common to all run-of-the-mine decisions suppressing evidence in criminal trials."). Moreover, no one here claims that the ordinary defense of preemption is an immunity, where the very right not to stand trial is at stake. *Compare Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984) (to allow litigation to go forward where parties had contracted for arbitration might erode federal policy embodied in Federal Arbitration Act); *with Belknap v. Hale*, 463 U.S. 491, 497 n.5 (1983) (holding that to allow case to go forward would risk eroding federal policy requiring matter at issue to be decided by NLRB, not by state courts).

In sum, because this case does not fit any exception to § 1257's final judgment requirement, this Court lacks jurisdiction to review the decision below.

II. THERE IS NO CONFLICT AMONG THE FEDERAL COURTS OF APPEAL OR STATE COURTS OF LAST RESORT.

Fletcher does not contend, nor could it, that the West Virginia Supreme Court of Appeals' decision conflicts with a decision of another state court of last resort or a decision of any federal court of appeals. Indeed, *no* appellate court has *ever* adopted the position advanced by Fletcher. For that reason alone, this Court should deny review.

Therefore, Petitioner has failed to provide compelling reasons for this Court to grant certiorari in this matter. In the final analysis, there is no compelling reason to grant this Petition because the West Virginia Supreme Court's decision left scant room for doubt that it was correctly decided.

III. THE WEST VIRGINIA SUPREME COURT OF APPEALS CORRECTLY INTERPRETED THE FEDERAL MINE SAFETY AND HEALTH ACT AND FOUND THAT FIELD PREEMPTION DOES NOT BAR RESPONDENTS' STATE COMMON LAW CLAIMS.

A. The Federal Regulations Relating to Dust Collectors on Roof Bolting Machines Do Not Create Field Preemption.

Petitioner Fletcher argues that although the MSHA contains an explicit savings provision in § 955 which provides that any state laws that are more stringent will not be in conflict with the MSHA, the detailed federal regulations found in 30 C.F.R. Part 33 (2006) nonetheless mean that Congress did not intend to have any state involvement on issues relating to roof bolting machines. The West Virginia Supreme Court rightfully disposed of this argument by first pointing to the best evidence of Congress's intent, which is found in § 955 of the Act:

> (a) No State law in effect on December 30, 1969 or which may become effective thereafter shall be superseded by any provision of this chapter or order issued or any mandatory health or safety standard, except insofar as such State law is in conflict with this chapter

> or with any order issued or any mandatory health or safety standard.
>
> (b) The provisions of any State law or regulation in effect upon the operative date of this chapter, or which may become effective thereafter, which provide for more stringent health and safety standards applicable to coal or other mines than do the provisions of this chapter or any order issued or any mandatory health or safety standard shall not thereby be construed or held to be in conflict with this chapter. The provisions of any State law or regulation in effect December 30, 1969, or which may become effective thereafter, which provide for health and safety standards applicable to coal or other mines for which no provision is contained in this chapter or in any order issued or any mandatory health or safety standard, shall not be held in conflict with this chapter.

Pet. App. at 15a-16a.

Most notably, Petitioner Fletcher asserts without any supporting authority or statutory language that Congress only intended for the above language to apply to certain areas of state supplementation of coal mine health and safety, but not to the manufacturers of roof bolting machines. More specifically, Petitioner asserts that because there are detailed federal regulations relating to roof bolting machines and dust collection systems contained in 30 C.F.R. Part 33, field preemption exists. Since "[e]vidence of pre-emptive purpose is sought in the text and structure of the statute at issue," the

West Virginia Supreme Court began its analysis by going directly to the MSHA. *CSX Transportation v. Easterwood*, 507 U.S. 658, 664 (1993). After reviewing the language set forth in the MSHA, the West Virginia Supreme Court explained that "because Congress has clearly expressed its intent not to preempt all state law or to occupy the entire field, we conclude that field preemption does not exist in this case." Pet App. at 16a.

In addition, the court below rejected Fletcher's contention that Congress did not intend for § 955 to apply to roof bolting machine manufacturers, but instead intended to occupy the entire filed based on the regulations found in 30 C.F.R. Part 33. The court pointed to 30 U.S.C. § 802(h)(1), which explicitly provides that "coal or other mine" means, among other things, "equipment" and "machines" "used in, or to be used in . . . the work of extracting . . . minerals." Pet. App. at 17a-18a. The court found no ground, especially in the absence of express language to the contrary, to exclude roof bolters from application of the § 955 savings clause. Pet. App. at 18a.

The West Virginia Supreme Court's analysis is in harmony with this Court's jurisprudence, which holds that "[i]f Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly." *Bates, et al. v. Dow AgroSciences*, LLC, 125 S.Ct. 1788, 1801 (2005). Further, as set forth in *Medtronic v. Lohr*, "[i]t is, to say the least, difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Id.*, 518 U.S. 470, 487 (1996) (citing *Silkwood v. Kerr-McGee Corporation, et al.*, 464 U.S. 238 (1984)).

In the present case, Congress expressed unequivocally that it does not intend to preempt more stringent state laws and regulations relating to mine safety and health issues. Moreover, the MSHA makes it clear that that the language applies equally to equipment and machinery manufacturers. The mere fact that certification regulations exist in 30 C.F.R. Part 33 does not provide this Court with evidence that despite the clear and unambiguous statement in § 955, Congress nonetheless meant to preempt state common law claims. Indeed, "[i]f Congress intended such a result, its failure even to hint at it is spectacularly odd . . ." *Medtronic*, 518 U.S. at 491.

B. The West Virginia Supreme Court of Appeals Correctly Held that Conflict Preemption Does Not Exist Simply Because a Jury May Find That Fletcher's Roof Bolting Machines are Defective.

Fletcher also contends that allowing a judge or jury to find liability would conflict with federal law because its roof bolting machines must comply with certain federal regulations. In finding that these arguments do not provide a basis for implied preemption, the West Virginia Supreme Court followed this Court's direction on preemption principles.

First, the court emphasized that Fletcher failed to demonstrate that it is impossible to comply with a jury verdict that may create or enforce more stringent standards than federal law. Indeed, the court noted that Petitioner's compliance with more stringent state standards, as permitted under § 955, would necessarily and logically mean that it is possible to comply with the less stringent federal standards. Pet. App. at 20a.

Second, the court found that the MSHA's overriding purpose is to protect the health and safety of coal miners. Significantly, a jury verdict based on a more stringent standard than that set forth in the federal regulations would not frustrate the stated purpose of the Mine Safety and Health Act, which provides in § 801(a) that "Congress declares that – (a) the first priority and concern of all in the coal mine or other mining industry must be the health and safety of its most precious resource – the miner." Moreover, the MSHA is filled with other similar examples of Congress's paramount concern with protecting the health and safety of coal miners. For example, Congress emphasized that states should be assisted in the development and enforcement of effective state coal or other mine health and safety programs; that the federal government should promote, assist, and encourage the development of more stringent state laws relating to occupational disease and mine health and safety; and that in cooperation with states, research and development and training programs aimed at preventing occupationally caused diseases in the industry should be developed. Pet. App. at 20a-21a; 30 U.S.C. §§ 801, 953.

Thus, much like *Medtronic,* where this Court pointed out that the "the primary issue motivating the MDA's enactment [was] the safety of those who use medical devices," *Medtronic*, 518 U.S. at 490-91, the court below was persuaded by the wealth of language in the MSHA which evidences a primary objective of protecting the health and safety of coal miners. *See also Sprietsma v. Mercury Marine*, 537 U.S. 51, 70 (2002) (". . . [T]he concern with uniformity does not justify the displacement of state common-law remedies that compensate accident victims and their families and that serve the Act's more predominant objective, emphasized by its title, of promoting boating safety"). Thus,

the goals and objectives of the statute would be enhanced, not frustrated, by state common law supplementation.

Additionally, Fletcher argues that allowing juries to consider whether Fletcher's roof bolting machines are defective or fail to adequately warn would create uncertainty and non-uniformity across the country. Pet. at 11-12. Petitioner cites *Geier* in support of its policy goal of uniformity, but fails to point out that this Court explained that "the saving clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce safety standards, while simultaneously providing necessary compensation for victims." *Geier,* 529 U.S. at 1920. This Court has followed the same course in *Bates, Medtronic* and a host of other cases in holding that it is entirely appropriate to allow a jury to decide whether a manufacturer subject to extensive federal regulation has designed a reasonably safe product. *See, e.g., Bates,* 125 S.Ct. at 1799; *Medtronic,* 518 U.S. at 487; *Sprietsma,* 537 U.S. at 70. Indeed, this Court pointed out that "there is no reason to think such occurrences would be frequent or that they would result in difficulties beyond those regularly experienced by manufacturers of other products that everyday bear the risk of conflicting jury verdicts." *Bates,* 125 S.Ct. at 1803.

Fletcher also contends that the phrase "any State law or regulation" should be interpreted to mean only legislation or agency regulation, not common law. Pet. at 13. Petitioner made the exact *opposite* argument in the court below, where it asserted in furtherance of its confused express preemption argument to the West Virginia Supreme Court that "State law" includes common law. *See* July 3, 2006 Reply Brief of Appellant/Defendant-Below, J.H. Fletcher & Co. to

Appellees' Response at p. 35 ("The FMSHA preemption provision is not ambiguous. It defines preemption in express conflict terms, specifically defined as '[a]ny State law' . . . . 'State law' includes common law."). Now, Fletcher has completely reversed course and seeks to distort this Court's opinion in *Sprietsma,* 537 U.S. at 63, which found that the phrase "a law or regulation" does not encompass common law claims. There, the Court emphasized that the letter "a" implies a discreteness which is embodied in statutes. *Sprietsma*, 537 U.S. at 63. In the present case, as Petitioner rightfully conceded in the court below, the phrase found in the MSHA is far more expansive than "a law or regulation." Indeed, the MSHA broadly authorizes "any State law" that is more stringent than that provided for by MSHA or the federal regulation. As this Court explained in *Cipollone v. Liggett Group, Inc., et al.,* "[a]t least since *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), we have recognized the phrase 'state law' to include common law . . ." *Id.*, 505 U.S. 504, 522 (1992).

Finally, the court below emphasized that faithful compliance with regulatory standards does not mean that Congress intended to shield Petitioner from claims that its dust collectors are defective. This Court has repeatedly preserved common law claims despite the presence of comprehensive and detailed federal regulatory schemes. The court below pointed to the language in § 955, which explicitly authorizes more stringent health and safety standards applicable to coal mines and equipment and machinery. Pet App. at 24a. The court also pointed to the strong public policy reasons which oppose finding preemption in this case. Allowing juries to create and enforce safety standards will ensure that product manufacturers, including Petitioner, will continually strive to make those products safer than the

minimum standards required by federal Act. Pet. App. at 24a. Further, the court explained that 30 C.F.R. § 33.20 recognizes that "all possible designs, arrangements, or combinations of components and materials [of dust collectors] cannot be foreseen." Pet. App. at 24a. Thus, Congress wisely understood that safer designs may be produced years after adoption of the federal regulations. Those safer designs would be frozen out of the market place by substituting an outdated regulatory standard for the benefits of safer technology. Allowing juries to create and enforce more stringent standards would have the effect of producing safer roof bolters, and is entirely consistent with the many decisions of this Court.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 06-1206

IN THE

Supreme Court of the United States

J.H. FLETCHER & CO.,

Petitioner,

v.

JERRILL DAVIS and VIRGINIA DAVIS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

There is nothing about the policies underlying the federal preemption doctrine, or the case law applying it, that requires preemption to operate on an "all-or-nothing" basis. It makes eminent sense that, within a given statutory scheme, there can be some provisions that warrant preemptive effect and some that do not. Respondents offer no argument that comes to grips with, let alone disputes, this proposition, probably because no federal court has held otherwise. The failure to recognize that is what led the West Virginia Supreme Court of Appeals astray. That is why this Petition for a Writ of Certiorari presents an important question of federal law fit for clarification. What this Court has to say about this question will be relevant every time a statutory preemption question is raised.

I. This Court Clearly has Jurisdiction.

Offering no substantive basis for their claim that the writ should be denied, Respondents pitch their Opposition on other grounds. They contend that this Court lacks jurisdiction because the "final judgment" requirement of 28 U.S.C. § 1257(a) (1988) has not been met. Yet, ironically, the principal authority that Respondents cite for that argument, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), demonstrates its falsity here.

The case at bar fits well within the types of cases the *Cox* Court identified as subject to review in this Court even if it can be argued that the case underlying the decision at issue has not been litigated to conclusion. Specifically, it qualifies for the fourth *Cox* category, affirming jurisdiction in this Court "where the federal issue has been finally decided in the state courts" and "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Id.* at 482-83. *See also Ft. Wayne Books v. Indiana*, 489 U.S. 46, 55 (1989).

In explaining the origins of this category, this Court cited earlier cases such as *Construction Laborers v. Curry*, 371 U.S. 542 (1963), in which "the power of the state court to proceed in the face of the preemption claim was deemed an issue separable from the merits and ripe for review in this Court," *Cox*, 420

U.S. at 483, and *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963) in which the application of a federal statute was deemed a "separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 558.

This case is precisely the type contemplated by the fourth *Cox* category, as reversal of the West Virginia Supreme Court of Appeals ruling on the preemption issue would in fact preclude any further proceedings in this case. Yet Respondents ignore this obvious truth and merely assert that there would be no risk of eroding federal policy (one of the stated concerns of this Court in articulating this particular exception) by allowing this case to proceed to trial. But that very concern is exactly why this Court should grant review now. As explained in the Petition, the federal Mine Safety and Health Administration has developed a comprehensive set of regulations applicable to the dust suppression systems in roof bolting machines that the agency applies exclusively. To allow unpredictable and potentially inconsistent tort litigation to interfere with this regulatory regime would present a clear erosive threat to this area of federal policy.

II. This Case Presents Compelling Unresolved Issues of Federal Preemption.

Respondents contend that because there are no conflicting federal or state decisions, other than the decision below, there is nothing to justify this Court's intervention. But Rule 10(c) of this Court's rules blows away that smokescreen. This is a case fit for the granting of the writ because "a state court of last resort has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

The Petition openly acknowledges that no federal court has yet construed the preemption and savings clause provisions of the federal Mine Safety and Health Act, 30 U.S.C. § 955 (2000). Neither has any federal court determined whether federal law

may preempt a discrete area even though the broader regime of which it is a part otherwise allows for the coexistence of state law that is not inconsistent with federal law. (Pet. at 7-8.) These are important issues that merit review here.

III. State Regulation Via Tort Litigation is Precluded on Conflict Preemption Grounds.

To give effect to congressional intent, field preemption in the regulation of dry dust suppression systems in roof bolting machines is required. "Preemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57 (1990). In this case, the comprehensive nature of the regulatory apparatus applicable to these machines shows that it makes no sense to permit additional "regulation" in this highly technical area through lay jury verdicts. Put simply, the law makes the federal regulatory agency the final arbiter of machine design and safety. The basic principles of conflict preemption thereby preclude interfering jury verdicts. As this Court stated only recently, state regulation of nationally regulated entities is permissible only "where doing so does not prevent or significantly interfere with" the exercise of federal regulatory authority. It is not permissible where "state prescriptions significantly impair the exercise of [federal] authority, enumerated or incidental" under the relevant federal statute. *Watters v. Wachovia Bank N.A.*, 127 S.Ct. 1559, 1567 (2007). *See also United States v. Locke*, 529 U.S. 89, 106 (2000).

Respondents' Opposition does not even mention that the federal regulations governing Petitioner Fletcher's product require that any design or labeling changes be submitted to the MSHA for approval in a process nearly as rigorous as the initial approval process. 30 C.F.R. § 33.12 (2006). That is why no jury in West Virginia or any other state can have the last word in this area. From the moment of entry, a jury verdict of negligence will conflict with federal law if it is against a manufacturer who is otherwise in compliance with federal

MSHA regulations. At best, the jury verdict can be regarded as a recommendation, but MSHA must ultimately determine all issues of permissible design. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (there is conflict preemption when "it is impossible to comply with both state and federal law"). Accordingly, the principles of conflict preemption dictate that the joint operation of state and federal law in this field cannot be tolerated.

Buckman Co. v. Plaintiffs' Legal Committee, 531 U.S. 341 (2001) presents an example of inherent incompatibility that is instructive. That case involved medical devices that were required to undergo thorough review by the Food and Drug Administration. In view of the detailed FDA regulatory regime, this Court held state tort suits preempted by the federal law. The parallels with this case are plain and strongly support the grant of the writ to carry out the intent of Congress by foreclosing the inevitable conflicts that must ensue if tort verdicts are permitted to override the carefully wrought roof bolting/dry dust suppression rules of the Mine Safety and Health Administration.

IV. The Language of the Statute is Not to the Contrary.

In many areas, the MSHA permits the operation of "any State law or regulation" if it is more stringent than federal protections. But that statutory language strongly suggests that Congress envisaged the operation of such state laws, in certain areas, only if they are promulgated by the legislature or state agencies. Unlike some cases in which state law was construed to include common law, the MSHA does not use the looser terminology found in those settings. The statute here, unlike those cases, does not refer to "requirements" or "standards"; it deliberately employs the more formal terms "law or regulation." In that respect, this case is fully aligned with those in which ad hoc jury verdicts have been deemed preempted. *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002) (law or regulation "most naturally read as not encompassing common-law claims"); *Medtronic Inc. v. Lohr*, 518 U.S. 470, 480 (1996) (language points to "enactments of positive law by legislative

or administrative bodies, not the application of general rules of common law by judges and juries").

Lacking any better argument, Respondents contend that Petitioners in the court below spoke to the contrary when they stated that "state law includes common law." But Respondents conveniently ignore the context of that reference in which Petitioners surveyed the landscape and noted that, although there were some decisions in which references to "state law" were deemed to include common law, in others only positive legislative or agency enactments were held to be embraced within that term. That observation was and is fully consistent with the argument presented here that the language of the MSHA evinces an intent to give effect to concurrent state law embodied in statutes or regulations, but not to jury verdicts that are instinct with potential for conflict with federal law.

CONCLUSION

For the foregoing reasons, this is a compelling case for granting the Writ of Certiorari to settle an important question of federal law that will govern both here and in many other cases. It will affect the conduct of many businesses with nationwide activity that must operate under statutes with at least some preemptive effect. This is thus an important opportunity for this Court to effect a critical clarification by holding that a regime of federal regulation may include some provisions that are preemptive and some that are not.

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